200,470-9

WSBA

OFFICE OF DISCIPLINARY COUNSEL

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March 26, 2007

Ronald R. Carpenter, Clerk
Supreme Court of Washington
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Re: In re Jack Burtch, WSBA No. 4161
Public No. 05#00084

Dear Mr. Carpenter:

Enclosed is a Petition for Interim Suspension of Jack Burtch, with the following attachments: (1) Disciplinary Board's Order Adopting Hearing Officer's Decision, dated March 15, 2007, and (2) Hearing Officer's Findings, Conclusions and Recommendations, dated September 11. 2006. Also enclosed is a declaration of service by mail reflecting that Mr. Burtch was personally served with the Petition for Interim Suspension on March 21, 2007. See ELC 7.2(b)(1).

Please present these documents to the Chief Justice for an order requiring that Mr. Burtch appear before the Court on a certain date to show cause why the Petition should not be granted. I am schedule to be out of the office at a hearing from April 16-20, 2007. I would appreciate it if you would not schedule the show cause hearing during that week.

Sincerely,

Jonathan Burke

Jonathan Burke
Disciplinary Counsel

Enclosures

cc: Jack Burtch w/o enclosure
Therese Wheaton (Respondent's co-counsel) w/ enclosure
Public Bar File

200,470-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re JACK L. BURTCH, Lawyer (Bar No. 4161).	Supreme Court No. ASSOCIATION'S PETITION FOR INTERIM SUSPENSION (ELC 7.2(a)(2))

As required by Rule 7.2(a)(2) of the Rules for Enforcement of Lawyer Conduct (ELC), the Washington State Bar Association (Association) petitions this Court for an Order suspending lawyer Jack L. Burtch (Respondent) from the practice of law during the remainder of disciplinary proceedings against him. This petition is based on (1) the Disciplinary Board's Order Adopting Hearing Officer's Decision, entered March 15, 2007, and attached hereto as Appendix A, and (2) the Hearing Officer's Findings, Conclusions and Recommendations (FOF), attached hereto as Appendix B. The Disciplinary Board (Board) adopted the Hearing Officer's recommendation that Respondent be disbarred for (1) filing a frivolous claim, (2) falsely testifying and engaging in other deceptive conduct in court, (3) intentionally violating the Board's order to pay restitution in a prior disciplinary proceeding, (4) failing to diligently represent a client, and (5) charging unreasonable fees to a client.

BACKGROUND

On September 1, 2005, the Association filed a Formal Complaint

charging Respondent with seven counts of misconduct. By order dated March 27, 2006, this matter was set for hearing on May 1-4, 2006. On September 12, 2006, the Hearing Officer filed the FOF recommending that Respondent be disbarred. On September 25, 2006, Respondent filed a Notice of Appeal from the decision of the Hearing Officer to the Board. On January 19, 2007, the Board heard oral arguments from Respondent and Disciplinary Counsel. By order dated March 15, 2007, the Board adopted the Hearing Officer's decision, including the recommendation that Respondent be disbarred.

NATURE OF THE MISCONDUCT WARRANTING INTERIM SUSPENSION

In 2004, the Board ordered Respondent to pay restitution to a former client in a disciplinary matter. All of Respondent's misconduct in this matter occurred after the Board's 2004 decision. The Hearing Officer found that Respondent intentionally violated the Board's order to pay restitution to the client. FOF at 43. The client sued Respondent in small claims court to collect the restitution ordered by the Board. The Hearing Officer determined that Respondent asserted a frivolous claim that the restitution ordered by the Board should be offset by over $11,000 in unpaid fees when Respondent knew that the client owed him no fees. FOF at 20-23, 39. The Hearing Officer determined that Respondent falsely

testified about his fee arrangement with the client and engaged in other deceptive conduct during the court proceedings. FOF at 22-24, 40-41.

The Hearing Officer found also found that in another matter Respondent accepted $2,000 from a poor, disabled client and then failed to perform legal services for her as agreed. FOF at 50-51. The client was forced to terminate Respondent and find other counsel to represent her because the statute of limitations was due to expire and Respondent was not working on the matter. The Hearing Officer determined that Respondent refused to return unearned fees. FOF at 51-53.

The Hearing Officer found that Respondent engaged in a pattern of misconduct "which evidences disrespect for the legal system, indifference to his role as an officer of the court, and a failure to comprehend the impact of his actions on vulnerable clients." FOF at 35-36. Respondent has an extensive history of similar ethical misconduct spanning over 20 years, including a suspension,[1] a reprimand, and multiple admonitions. FOF at 36. Moreover, the Hearing Officer found that during the disciplinary proceedings Respondent falsely testified and submitted false evidence.[2] FOF at 46, 49, 54. The Hearing Officer determined that:

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[1] In re Disciplinary Proceedings Against Burtch, 112 Wn.2d 19, 770 P.2d 174 (1989).

[2] The Hearing Officer recommended that Respondent be suspended pending final resolution of this matter. FOF at 61.

> Respondent simply testifies without regard to the facts or the evidence and creates evidence to substantiate his position. The legal system and the public's confidence in it are seriously damaged by such behavior.

FOF at 56.

LEGAL ARGUMENT

Under ELC 7.2(a)(2), following a disbarment recommendation from the Board, the respondent lawyer bears the burden of proving that he should not be suspended during the remainder of the proceedings. The Rule requires the lawyer to make an "affirmative showing" that the lawyer's "continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or contrary to the public interest."[3]

The Rule presumes that once the Board has recommended disbarment, the lawyer should be suspended. This presumption does not arise merely from the potential for additional similar misconduct. Rather, the presumption recognizes that the Board recommends that a lawyer be disbarred only in cases of extremely serious misconduct, and that allowing

[3] This standard differs markedly from that required by ELC 7.2(a)(1) to justify an interim suspension during the course of disciplinary proceedings prior to the entry of a sanction order by the Board where the Association must prove that the lawyer's continuing to practice will result in "substantial threat of serious harm to the public."

such a lawyer to continue to practice as if nothing had happened injures the integrity of the profession and is contrary to the public interest.

CONCLUSION

Under ELC 7.2(a)(2), the Association asks the Court to issue an Order requiring that Jack Burtch appear before this Court on a date certain to show cause why this Petition should not be granted. The Association further requests that the Court issue an order on that date immediately suspending him from the practice of law.

DATED THIS 16th day of March, 2007.

Respectfully submitted,

WASHINGTON STATE BAR ASSOCIATION

Jonathan Burke

Jonathan Burke, Bar No. 20910
Disciplinary Counsel
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 733-5916

APPENDIX 1

FILED

MAR 15 2007

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re JACK L. BURTCH, Lawyer (Bar No. 17151).	WSBA File No. 05#00084 DISCIPLINARY BOARD ORDER ADOPTING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its January 19, 2007 meeting on automatic review Hearing Officer Bertha Fitzer's decision recommending disbarment following a hearing.

Having reviewed the documents designated by the parties, and the parties' briefs, and considering oral argument[1]:

IT IS HEREBY ORDERED THAT the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation is adopted.

The vote on this matter was unanimous.

Those voting were Andrews, Carlson, Fine, Heller, Hollingsworth, Kuznetz, Madden,

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Mosner and Romas. Ms. Darst and Mr. Cena did not participate in this matter and were not present during deliberation or voting.

Dated this 15th day of March, 2007.

Lawrence Kuznetz

Lawrence Kuznetz, Vice Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Board Order Adopting HO's Decision to be delivered to the Office of Disciplinary Counsel and to be mailed to Therese Wheaton, ~~Respondent~~/Respondent's Counsel at 330 W Pioneer Ave. St. C, Montesano, WA 98563, by ~~Certified~~/first class mail, postage prepaid on the 15 day of March, 2007.

Respondent
Jack L. Burtch
218 N. Broadway St.
POB A
Aberdeen, WA 98520

Clerk/Counsel to the Disciplinary Board

[1] Although Therese Wheaton is counsel of record in this matter, she was not present and Mr. Burtch presented oral argument to the Board.

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APPENDIX 2

BEFORE THE

DISCIPLINARY BOARD

OF THE

WASHINGTON STATE BAR ASSOCIATION

In RE: **RESPONDENT** **JACK L. BURTCH** Lawyer (Bar No. 4161	Public No. 05#00084 FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

I. INTRODUCTORY MATTERS

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC") a hearing was held before the undersigned Hearing Officer on May 1, 2, 3, 4 and 5th, 2006. Respondent appeared and was represented by Ms. Therese Wheaton. Respondent was granted special permission to assist as co-counsel on the second day of the hearing and continued in that capacity through the end of the hearing. Disciplinary counsel Jonathan Burke appeared for the Association.

The record in this case was held open for preparation of the transcript and for presentation of written closing arguments. The record closed in this case upon receipt of the Association's rebuttal argument.

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HEARING OFFICER
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II. FORMAL COMPLAINT

The Respondent was charged by Formal Complaint dated September 1, 2005, with seven counts of violation of the Rules of Professional Conduct.

Count 1 alleges Respondent violated RPC 3.1 by claiming in district court that former client, Ms. Donna McGuin, owed Respondent outstanding fees of $11,738.24 and/or by claiming that the billing statement reflected an actual debt owed by Ms. McGuin that could offset restitution previously ordered by the Disciplinary Board.

Count 2 alleges Respondent violated RPC 3.3(a) and/or RPC 8.4(c) by testifying falsely about the obligation owed by Ms. McGuin and/or by submitting the billing statement to the district court as evidence of the obligation owed to Respondent by Ms. McGuin.

Count 3 alleges Respondent violated RPC 3.4(c) and or 8.4(1) and/or former RLD 1.1(n) by refusing to pay restitution to Ms. McGuin as required by the Disciplinary Board's order, ELC 13.7 and/or former RLD 5.3(b).

Count 4 alleges that in the event that Respondent represented Ms. McGuin on an hourly fee basis, Respondent violated RPC 8.4(c) by testifying falsely at the September 11, 2000 disciplinary board hearing that he had represented Ms. McGuin on a contingent fee basis, and/or by falsely stating during his oral argument before the Disciplinary Board on April 13, 2001 that he represented Ms. McGuin on a contingent fee basis.

Count 5 alleges Respondent violated RPC 1.5 by not diligently pursuing either or both of Ms. Roxie Moreland's claims.

Count 6 alleges Respondent violated RPC 1.4(b) and/or RPC 1.5(b) by failing to explain, adequately and accurately, the fee agreement, and/or by failing to inform Ms. Moreland about his inability to pursue her legal matters in a timely manner.

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Count 7 alleges Respondent violated RPC 1.5(a) and or RPC 1.15(d) by failing to return unearned fees to Ms. Moreland and/or by failing to withdraw in a timely manner from representing her.

III. EVIDENTIARY AND PROCEDURAL RULINGS

This highly contentious hearing involved multiple procedural and evidentiary rulings that were resolved as follows:

A. Testimony of Michael D. Norman

Following the initial disclosure of witnesses, the Association identified Attorney Michael D. Norman, the lawyer who subsequently represented Ms. Moreland following her termination of Respondent. Although Respondent had conducted no other pre-hearing discovery, he moved to exclude Mr. Norman's testimony. He argued that the Association did not disclose this witness in a timely fashion and he was therefore prejudiced because the witness was disclosed after the time for taking of depositions.

At the pre-hearing conference, the Association was instructed to make Mr. Norman available for either deposition or to be interviewed by Respondent's attorney before the hearing. Through no fault of the parties, this pre-hearing discovery did not take place. Respondent was therefore provided time to interview the witness immediately before the witness testified. Respondent was not prejudiced by the timing of this witness disclosure and the motion to exclude was denied.

Certain portions of Mr. Norman's testimony pertaining to disposition of the litigation were subject to a confidentiality agreement. All of Mr. Norman's testimony that was subject to the confidentiality agreement has been sealed by the court reporter and is not part of the public record in this matter. Only those matters subject to the confidentiality agreement are contained therein.

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B. Association Motion to Exclude Testimony of "Expert" Witnesses

1. Admissibility of Expert Testimony Generally

The Association moved to exclude Respondent's expert witnesses based on the argument that the interpretation of the Rules of Professional Conduct were the sole province of the Hearing Officer. The initial ruling in this matter was that limited expert testimony would be allowed but only as to those witnesses whose identity as experts was revealed in Respondent's Pretrial Witness Disclosure. Respondent's witness disclosure only described former Judge John Kirkwood and attorney John Farra in this manner.

During the hearing Respondent objected to this limitation, arguing that the witness disclosure was completed by his attorney and did not comply with his intent regarding this issue. Because of the seriousness of the charges filed against Respondent, this remaining limitation was lifted during the hearing. Attorneys William Morgan and Stephen Johnson were also allowed to present testimony regarding the application of the Rules of Professional Conduct.

2. Retired Judge John Kirkwood

Retired Judge Kirkwood was Respondent's law partner prior to 1966 and has appeared at prior disciplinary hearings involving Respondent. Judge John Kirkwood last practiced law in 1966 and retired from the judiciary in 1984. Judge Kirkwood offered general testimony that the Respondent had a fine legal mind and that he, Judge Kirkwood, had never had occasion to impose sanctions upon him. Some specific lines of questioning during Respondent's direct of Judge Kirkwood were restricted based on remoteness of experience, the failure to establish expert qualifications and the failure to lay proper

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foundation establishing familiarity with the issues that counsel desired the judge to address. TR 47; 49.

Later in the proceedings, Respondent made an oral offer of proof stating that Judge Kirkwood would have testified that Respondent had not provided false testimony, that Respondent had not pursued a frivolous defense in asserting that he was entitled to offset outstanding fees against the restitution ordered by the Bar Association and that he did not violate the Rules of Professional conduct as to either Ms. McGuin or Ms. Moreland. TR 892.

The offer of proof did not comply with the minimum requirements for a proper offer of proof and did not correct the foundation issues. More fundamentally, the proposed testimony purported to resolve factual issues, which are the province of the fact finder and would not have been helpful to resolution of the issues presented in this hearing. This Officer therefore chose not to alter the prior ruling regarding limitations on Judge Kirkwood's testimony.

However, even considering the offer of proof as if Judge Kirkwood had presented such testimony, the Findings of Fact listed in Section IV below would not change. Had Judge Kirkwood so testified, his testimony would have been contradicted by documentary evidence, the testimony of other witnesses and the officer's independent resolution of credulity issues based on the totality of the evidence.

3. John Farra

Respondent presented the expert testimony of attorney John Lester Farra. Mr. Farra's interpretation of current rules was based on incomplete hypotheticals. In addition, Mr. Farra's testimony was of limited utility as it contradicted applicable legal authority.

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To expedite the hearing, cross-examination was not allowed of this witness. Respondent was allowed to present Mr. Farra's testimony in full and was offered an additional opportunity to make sure his record was complete. Respondent's direct of this witness appears in the record for purposes of appellate review.

C. Testimony as to Other Incidents/ Bad Acts

Respondent moved to exclude evidence relating to prior discipline and uncharged acts of misconduct. The motion regarding prior discipline was denied. Prior discipline is relevant to the sanction analysis unless Respondent requests a bifurcated hearing and the issue of sanctions is removed from the initial hearing. Respondent did not make a timely bifurcation motion.

Evidence pertaining to past misconduct was not considered as evidence that the Respondent had acted in conformity with such acts as to the present charges. Consistent with **ER 404**, this officer ruled that the evidence could be used for other purposes. The evidence was admitted for impeachment and/or to determine knowledge, intent, lack of mistake, and as evidence relevant to aggravating and mitigating factors.

Evidence relating to the Respondent's mental state and motive is always considered in determining appropriate sanctions. ABA Standard 9.22(a); 9.32(b). Evidence of prior discipline is relevant to two aggravating factors, prior discipline and pattern of misconduct. ABA Standard 9.22(a); 9.22(c).

D. Testimony of Complainant Donna McGuin

Ms. Donna McGuin is an elderly woman whose interactions with Respondent date back to 1988. Ms McGuin testified in the prior disciplinary action and again when she brought her claim against Respondent for payment of restitution in district court. Ms. McGuin currently suffers from advanced Parkinson's disease, the symptoms of which are

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aggravated by stress. During the course of the present hearing, it became evident that further participation in the hearing was detrimental to Ms. McGuin's physical and emotional health. Ms. McGuin's testimony was interrupted and counsel conferred with the Hearing Officer. All parties agreed that Ms. McGuin should not be required to testify further.

Because these events occurred before cross-examination had been completed, Ms. McGuin's entire testimony during this proceeding has been struck and is not being considered for the substantive findings in this case.

As Ms. McGuin's disease process was apparently progressive, and because Ms. McGuin had previously testified under oath in matters involving the same parties, Ms. McGuin's testimony in the district court proceeding was relied upon to support the factual findings described below. The factual findings are further supported by documentary evidence, Respondent's testimony and the unchallenged Findings of Fact and Conclusions of Law entered in the previous disciplinary action.

E. Hearing Irregularities and Motions for Mistrial

This hearing included various contentious arguments regarding evidence, proper scope of cross-examination and conduct of counsel.[1] Respondent made several motions for mistrial alleging that the Hearing Officer failed to allow his expert to testify fully, that he was being denied a fair hearing and that he was the subject of character

[1] Bar counsel argues that Respondent obstructed the hearing by being "antagonistic and rude to the Hearing officer and repeatedly challenging her rulings." Association Closing Brief at 24. This officer does not agree that Respondent's conduct to her was "rude or antagonistic." While Respondent did challenge rulings and aggressively asserted his rights, his conduct, while not a model of professionalism, was not interpreted as being directed at the Hearing Officer.

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assassination. These motions were denied. Respondent was given full opportunity to present his case and all admissible evidence was allowed.

Moreover, additional precautions were put in place to ensure that Respondent was receiving a full and fair hearing and had all available resources available to him. Respondent was allowed to act as co-counsel for days two through five of the hearings, essentially double-teaming the Bar Association. Respondent was provided ample time during the hearing to consult with co-counsel to make decisions. The proceedings were delayed to allow Respondent and his attorney an opportunity to interview witnesses. Finally, to ensure that Respondent received a fair hearing, where any doubt existed regarding the admissibility of evidence those doubts were resolved in favor of the Respondent.

IV. FINDINGS OF FACT

A. Findings Applicable All Charges

After having considered the testimony of the witnesses, the exhibits admitted into evidence, reviewing written arguments of counsel and being fully advised, the Hearing Officer finds the following facts are either undisputed or were proven by a clear preponderance of the evidence.

1. Respondent was admitted to the practice of law in the State of Washington on September 14, 1955.

2. Respondent's testimony regarding his dealing with both clients often conflicted with documentary evidence such as time records, telephone records, billing invoices and other documents and conflicted with his prior testimony in related proceedings.

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3. As a result of the inconsistencies in testimony in comparison to written documentation and because the Respondent has provided conflicting testimony in several different proceedings, Respondent's testimony was generally not credible.

4. A former member of Respondent's staff, Janice LaVelle, testified concerning both client matters. Ms. LaVelle's testimony was also contradicted by documentary evidence and other testimony. Ms. LaVelle's testimony was not credible[2] on the issues of client contacts with Respondent and the existence of written fee agreements.

5. Expert testimony regarding Respondent's conduct in these cases was elicited through incomplete hypothetical questions and was therefore of limited assistance in interpreting the ethical rules applicable to the facts of the instant charges.

B. General Findings of Fact Relevant To Donna McGuin Matter.

6. Respondent represented Donna McGuin from approximately 1988 to the end of 1996 in separate, but related, matters.

7. Ms. McGuin consistently maintained that she understood that Respondent had agreed to a contingent fee agreement with payment of costs and sanctions.

8. Respondent has at various times confirmed that he had agreed to a contingent fee on the condition that Ms. McGuin pay some fees and provide him with funds sufficient to pay sanctions.

[2] Judge Goelz also found that Ms. LaVelle was not credible in presented testimony in the district court proceeding. TR 82.

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9. Respondent's references to the contingent fee agreement were accompanied by statements that Ms. McGuin did not owe him anything after the trial and that the billing statement, Exhibit A-7, was sent in error. See Ex. 11, pp. 50-51; 193.

10. In the present proceeding, Respondent claimed that he and Ms. McGuin at one time had a written fee agreement based on an hourly agreement. He asserted further that Ms. McGuin stole it at some unspecified time when she took the files home.

11. The testimony that Ms. McGuin stole the fee agreement is not credible. There is no evidence that Ms. McGuin had access to the files after the fee dispute arose. Prior to the dispute Ms. McGuin would have had no motive for removing the document.

12. Had the agreement been "stolen" nothing would have prevented the Respondent from preparing a new document from computer backups, which Ms. Lavelle testified were kept in the ordinary course of business. No explanation was given for why a new agreement was not drafted after the first allegedly disappeared.

13. Twice during his representation of Ms. McGuin, Respondent incurred significant sanctions because of his conduct. The first set of sanctions occurred in 1993 when Respondent informed the court that he was not ready to proceed to trial on the trial date. The court imposed sanctions of $2,000 at this time.

14. The second incident regarding sanctions occurred in 1996 when the Respondent disregarded the court's rulings regarding motions in limine. The court imposed sanctions of $877.86.

15. Respondent agreed that he would transform his hourly fee agreement into a contingent fee agreement if Ms. McGuin provide him hourly fees in an amount equal to the sanctions.

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16. Ms. McGuin complied with this condition and provided funds equal to or greater than both sanctions at the time the sanctions were imposed.

17. In the current proceeding, Respondent testified that the agreement to convert the hourly fee agreement to a contingent fee agreement occurred shortly before the 1996 trial. This testimony is not credible. It is contradicted by Respondent's testimony in the prior disciplinary action, documentary evidence and by circumstantial evidence that the payment of sanctions would more likely be an issue for the larger sanctions imposed in 1993 than the much smaller amount imposed in 1996.

18. Respondent eventually tried Ms. McGuin's case in December 1996. During the course of the trial, Ms. McGuin rejected a settlement offer made by the defendants. Ms. McGuin, as the client, had the right to make the final decision on this issue. RPC 1.2. The jury returned a verdict adverse to Ms. McGuin.

19. On January 8, 1997, Ms. McGuin contacted the Bar Association. The Bar Association treated this contact as a grievance, although it is not clear that that was Ms. McGuin's original intent.

20. On an invoice dated January 29, 1997, Exhibit A-7, Respondent claimed that Ms. McGuin owed his firm $11,738.24 in addition to amounts paid during the 1988-1996 period. It is not clear whether this invoice was sent before or after Respondent learned that Ms. McGuin had contacted the WSBA regarding issues she had with Respondent. However, that uncertainty does not affect the conclusions contained herein.

21. The relationship between Respondent and Ms. McGuin was the subject of a prior disciplinary hearing conducted on September 11, 2000.

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22. During the course of the prior disciplinary proceeding, Respondent testified and argued that he had an hourly fee agreement, which was transformed into a contingent fee agreement. This position is expressed in at least eight different places in the transcript. *See, e.g.,* Ex. 11, pp. 50-51; 184; 191-92; 199-200; 201; 210; 253; 264. Respondent's statements that the hourly fee agreement had been transformed into a contingent fee agreement were unequivocal.

23. During the course of the hearing, Respondent also testified, under oath, that the invoice, Exhibit A-7, had been sent to Ms. McGuin in error, that sending it "was not proper," that Ms. McGuin was right in complaining about the bill and that, "she didn't owe me any money. I had agreed to that." Ex. A-11, pp. 184, 191, 193.

24. Findings of Fact, Conclusions of Law and Recommendations were filed on October 12, 2000. The Hearing Officer's findings do not include a detailed discussion of the January 1997 invoice nor do they resolve the issue of whether a contingent fee agreement in fact existed between Ms. McGuin and Respondent. The Hearing Officer did conclude, however, that Respondent owed Ms. McGuin $2640.15 in restitution because he had forced her to pay sanctions, which were levied against him. Ex. A-34 at p. 23.

25. The Hearing Officer recommended that Respondent be suspended for a period of 6 months for misconduct associated with his representation of Ms. McGuin.

26. Respondent appealed and represented himself during the appeal of the Hearing Officer's Findings and Conclusions. The Disciplinary Board heard argument on April 13, 2001.

27. During argument on the appeal of the disciplinary recommendation, Respondent again stated that he had agreed to a contingent fee with Ms. McGuin.

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28. There is no reference in these prior proceedings to a "conditional" contingent fee agreement nor is there any claim that Ms. McGuin breached the contingent fee agreement by bringing Respondent's conduct to the attention of the Bar Association.

29. The Disciplinary Board reduced the Hearing Officer's recommended sanction to an admonition based on its reversal of one count. It did not alter the Hearing Officer's other Findings of Fact or his restitution requirement. Ex. A-5. The Board ordered that Respondent pay Ms. McGuin $2,640.15 with 12% interest on that amount from January 29, 1997 until the amount was paid.

30. Respondent filed an exception to costs and expenses on August 1, 2001. Ex. A-44. In that document, Respondent argued that costs and expenses should not be imposed because the restitution order created a significant financial burden and further costs and expense would exacerbate the financial hardship created by the restitution order.

31. The Bar Association informed Respondent that the restitution payment of $4,097.52, which represented the restitution amount plus interest, was to be paid within 30 days or September 5, 2002. The Bar Association further informed Respondent that the money was to be paid unless he demonstrated in writing that he was unable to pay. **Ex. 45**. The letter went on to state that unless arrangements were made, the Bar would assume that the Respondent would pay the full amount due Ms. McGuin.

32. Respondent did not provide written proof of an inability to pay the restitution order nor did he take any other steps consistent with the position that he did not understand his obligations under the restitution order. Respondent did not appeal the order.

33. The restitution order became final on September 19, 2002.

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34. Respondent was angry with Ms. McGuin for filing the Bar complaint and intentionally did not comply with the Bar's order to pay restitution.

35. The prior disciplinary hearing resolved the issue of whether the sanctions could be passed on to Ms. McGuin against Respondent.

36. In the present proceeding, Respondent claims that Ms. McGuin owed him money in excess of the restitution amount because she had breached her agreement to pay sanctions by reporting the matter to the Bar Association.

37. Respondent did not raise the defense during the prior hearing or his appeal that Ms. McGuin owed him money because she was litigating the issue of who was responsible for sanctions. He also did not claim that she was in breach of their fee agreement.

38. At no time following the prior disciplinary hearing, the appeal or the restitution order, did Respondent inform Ms. McGuin or the Bar Association that Ms. McGuin owed him money over and above the amount of restitution. He informed no one associated with the case that he was not required to pay the restitution order because Ms. McGuin had breached a condition of their agreement to transform the hourly fee agreement into a contingent fee.

39. Respondent's testimony in the prior proceedings along with his conduct following those proceedings is inconsistent with the claim that Ms. McGuin owed him money over and above the amount he owed her in restitution.

40. The issues and the parties before the Hearing Officer on September 11, 2000 and those before this Hearing Officer regarding the nature of the fee agreement between Respondent and Ms. McGuin are identical.

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41. Respondent's failure to challenge the restitution order precludes Respondent's argument that he did not owe Ms. McGuin restitution or that she owed him sums in excess of the restitution order and therefore he did not have to pay it.

42. Respondent is estopped from challenging the fact that he owed Ms. McGuin at least the amount contained in the restitution order.[3]

43. Alternatively, and in addition, this Hearing Officer finds overwhelming evidence that the Respondent's hourly fee agreement was converted to a contingent fee agreement upon the payment by Ms. McGuin of an amount equal to or greater than the sanctions imposed in October 1993. Ms. McGuin complied with this condition in October 1993.

44. The prior calculations contained in the Hearing Officer's Findings of Fact and Conclusions of Law do not coincide with the contents of Exhibit A-7. It appears that Bar Counsel in the previous matter inaccurately computed the amounts owed under that invoice and that the Hearing Officer relied upon those computations.

45. In the present proceeding, Respondent has argued that all issues pertaining to Exhibit A-7 were resolved in the prior hearing and cannot be reexamined. However, issues relating to the exact amount of overpayment and the dates of the change from an hourly to contingent fee occurred were not resolved and res judicata does not apply.

46. In subsequent proceedings before a district court judge, and in this hearing, Respondent claimed that he did not have to pay restitution because he was entitled to an

[3] As explained later in these findings, the restitution ordered in 2000 actually understated the total amount Respondent owed Ms. McGuin.

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offset. He relied upon Exhibit A-7 to substantiate his claim that Ms. McGuin owed him more money than he owed her.

47. To assess whether the defense is frivolous it is necessary to analyze Exhibit A-7 independently in light of the testimony presented in this hearing and in the prior disciplinary proceeding.

48. Respondent's invoice and trust accountings document that Ms. McGuin paid Respondent a total of $11,626.62.[4]

49. Respondent incurred reimbursable costs in the amount of $1,976.23.

50. In 1993, the Court imposed sanctions of $2,000, which Respondent subsequently paid with funds provided by Ms. McGuin.

51. Ms. McGuin fulfilled her part of the agreement to convert the hourly fee agreement into a contingent fee contract by paying $2,500 towards sanctions prior to October 11, 1993 and an additional $2,500. The hourly fee agreement was converted to a contingent fee agreement as of this date.

52. Ms. McGuin also paid an additional $890.00 for sanctions Respondent incurred in 1996.

[4] Ms. McGuin testified in prior hearings that her payments to Respondent were closer to $18,000. Respondent has not retained supporting documentation relating to this invoice or his trust accountings. Respondent's inability to provide records was an issue in the 2000 hearing, even though Respondent was informed shortly after his representation of Ms. McGuin terminated that there was a dispute regarding fees. In responding to questions during his appeal, Respondent first attempted to assert that the complaint had come in long after the events and records were not kept. When the error of this claim was pointed out to Respondent, he stated that he didn't know why the records were not available and suggested it was because of a move. Ex. 42, pp. 42-43. Respondent's poor record keeping and a reference to the fact that he had an employee who embezzled from him suggests that Ms. McGuin's claim of having paid a greater amount may have merit. She has not pursued additional amounts, however, and there is no way of presently resolving this dispute.

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53. The payments of $2,500 and $890.00 fulfilled all obligations Ms. McGuin had to pay sanctions as a condition of Respondent performing his services on a contingent fee basis.

54. Respondent was entitled to legal fees of $2925.00 for services rendered prior to October 11, 1993.

55. Respondent is not entitled to any hourly fees accrued after Ms. McGuin fulfilled the terms of the oral agreement converting the hourly fee agreement to a contingent fee agreement. As of October 11, 1993, Respondent's sole avenue of obtaining fees was the oral contingent fee agreement, which required him to successfully prosecute the action.

56. Respondent was not successful in obtaining a verdict in favor of Ms. McGuin.

57. Respondent is not entitled to any fees accrued after October 11, 1993.

58. Ms. McGuin and those acting on her behalf paid Respondent $6,725.39 in excess of the amount owed in fees and costs.

59. As a condition of converting the fee agreement from an hourly agreement to the contingent fee agreement, however, Ms. McGuin agreed to pay fees in the same amount as the sanctions.

60. Assuming that this agreement was valid, Respondent was entitled to an additional $2877.86 in fees. As noted above, these amounts were paid as required.

61. Deducting the $2,877.86 from the total amount Ms. McGuin paid results in a net overpayment of fees by Ms. McGuin of $3,847.53 as of January 1997.

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62. At the end of the attorney client relationship, Respondent owed Ms. McGuin $3,847.53, which is the amount in excess of the fees Respondent earned under his oral agreement that Ms. McGuin paid to Respondent.

63. Exhibit A-7 falsely stated that Ms. McGuin owed Respondent money. Even assuming that the facts are as Respondent represents in this hearing, Ms. McGuin did not breach the parties' agreement by asserting her right to have the Bar determine who should pay the sanctions. Ms. McGuin had fulfilled her obligation to pay an amount equal to sanctions independent of the restitution order. Respondent's reliance upon exhibit A-7 to document his argument that Ms. McGuin owed him money over and above the amount of restitution ordered by the Bar Association is frivolous.

64. The prior restitution amount appears to be in error. The minimum amount of restitution Respondent owed Ms. McGuin was $3,847.53. This is the amount of money Ms. McGuin paid in excess fees over and above the sanctions.

65. The restitution order of July 2001, understated the amount of unearned fees due Ms. McGuin by a minimum of $1207.38.

66. The Respondent was obligated to return the excess payment of $3847.53 plus 12% interest to run from January 29, 1997.

67. Respondent paid $2640.15 but has paid no interest on that amount.

68. Respondent owes Ms. McGuin the following; (1) the unpaid interest on the initial restitution order; (2) $1207.38 which is the difference between what should have been ordered as restitution for unearned fees and what was actually awarded, and (3) interest from January 29, 1997 on the sum of $1207.38. These sums do not include any amount toward payment of sanctions.

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69. The agreement that Ms. McGuin pay fees equal to the amount of sanctions is not in and of itself a breach of the ethical rules if the purpose of the arrangement was to liquidate the amount of fees due in return for switching from an hourly to a contingent fee agreement. Both parties voluntarily agreed to this arrangement.

70. In the event that the purpose of the prior restitution amount was to return the fees, which Ms. McGuin paid to reimburse the Respondent for sanctions, and the agreement is deemed invalid, Respondent owes Ms. McGuin $2,877.86 in addition to the amounts described in Finding of Fact 68.

71. Despite the agreement to convert the hourly fee agreement to a contingent fee, Respondent sent Ms. McGuin's account to a collection agency after Ms. McGuin contacted the Bar Association. This action was motivated by Respondent's anger with Ms. McGuin for having turned him into the Bar Association.

72. Respondent continued to attempt to collect the sums contained on Exhibit A-7 until 1998. On December 29, 1998 Respondent's office informed the collection agency that he was no longer interested in pursuing payment of the invoice. Ex. R-53. Respondent's reason for recalling the matter from collections was his apparent belief that he would be unsuccessful in collecting the money.

73. Respondent had an obligation to review Exhibit A-7 prior to sending it to collections to determine whether or not it accurately reflected an amount legally owed to him.

74. Respondent did not review his invoice. Had he done so, it would have been clear that the claim that Ms. McGuin owed him money was inaccurate and frivolous.

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C. Findings Relating to Specific Charges Involving Donna McGuin

Count 1 Assertion of a Frivolous Defense

75. In an attempt to collect the restitution as ordered by the Disciplinary Board, Ms. McGuin filed an action in district court in 2004.

76. Respondent defended this action by claiming that he was entitled to an offset of the amount of restitution against outstanding fees that Ms. McGuin owed him and by offering Exhibit A-7 to substantiate his claim.

77. At the time Respondent made this representation, Respondent knew that Ms. McGuin did not owe him fees. Respondent's own records establish that Ms. McGuin had paid Respondent all hourly fees she had incurred. The remaining fees were subject to the contingent fee agreement. He had previously testified that she did not owe him money and he had been ordered to pay her restitution.

78. Despite this previous testimony and Respondent's knowledge that Ms. McGuin did not owe him money, Respondent took a position directly contradicting his prior testimony. During the hearing before District Court Judge Douglas Goetz. Respondent informed Judge Goelz that Ms. McGuin owed him fees and claimed that he had documented fees in excess of $11,000.

79. This testimony was false.

80. During this disciplinary hearing, Respondent testified that he was unable to explain the fees and costs documented in Exhibit A-7. Respondent had an obligation to understand and to explain completely that document as it was issued under his name and was an attempt to collect fees in his name. This Officer provided additional time for Respondent to work with his attorney and his staff, if needed, to ensure that Respondent had every opportunity to explain the invoice. Despite being provided such time,

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Respondent claimed he could not explain the invoice or why it justified his testimony before Judge Goelz that Ms. McGuin owed him money.

81. Even though Respondent asserts Exhibit A-7 justified his claim of entitlement to an offset against the restitution previously ordered by the Bar Association, he offered no credible testimony as to why the charges contained on that invoice justified an offset.

82. Exhibit A-7 differs in form from sample invoices offered by the Bar Association from the same period of time contained in Exhibit A-9. The sample invoices reflect that Respondent's office provided clients with monthly, detailed accountings typical of those maintained by other legal offices. These statements contained data regarding prior transactions, balances being carried forward and clear statements of outstanding charges. The invoice sent to Ms. McGuin contains no such documentation even though it covers eight years of attorney/client financial transactions.

83. In the district court proceeding, Respondent intentionally omitted the material fact that he had previously testified under oath that Ms. McGuin did not owe him money. The district court judge was not aware of the substance of Respondent's previous testimony and that Respondent and Ms. McGuin had had a contingent fee agreement.

84. Respondent's testimony during the district court proceeding was unequivocal that there had been no contingent fee agreement between Respondent and Ms. McGuin.

85. Respondent's failure to reveal the material fact that he and Ms. McGuin had previously entered into a contingent fee agreement caused the district court judge to conduct research that would not have been needed had this fact been revealed during the hearing.

86. Had Respondent revealed that he and Ms. McGuin had a contingent fee agreement, the judge would have summarily disposed of the claimed right to offset.

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87. The claim that fees were owed as an offset was without factual basis.

88. Judge Goelz eventually concluded that the Respondent was obligated to pay the amount ordered as restitution.

89. The district court judge neglected to include interest as part of his decree. This omission was inadvertent and not meant to overrule the previous order regarding interest.

90. After the district court ruled in Ms. McGuin's favor, Respondent paid Ms. McGuin $2640.15. Respondent has not paid the interest as ordered by the disciplinary board.

Count 2 Violation of Duty of Candor to the Court

91. During the previous disciplinary hearing conducted on September 11, 2000, Respondent unequivocally testified that his agreement with Ms. McGuin had been converted to a contingent fee agreement and that the invoice that appears as Exhibit A-7 in this proceeding had been sent in error.

92. Respondent further testified that Ms. McGuin did not owe him money following the unsuccessful trial in December 1996.

93. Respondent confirmed this position in argument before the Disciplinary Board.

94. Despite multiple, unequivocal statements that he and Ms. McGuin had a contingent fee agreement and that she did not owe him money, Respondent testified falsely under oath that he had had an hourly fee agreement with Ms. McGuin.

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95. Respondent testified that "no attorney in his right mind would ever take it on a contingent fee basis and that it had "never been true" that he had agreed to take the case on a contingent fee basis. [5]

96. Respondent testified that "it was always our understanding that I was charging on an hourly basis and that we sent her (Ms. McGuin) many, many statements and she never contested those statements."

97. Respondent intentionally submitted this false testimony intending it to influence the district court and the outcome of Ms. McGuin's claim against him.

98. Respondent's manner of litigating this issue was abusive. At one point in the proceedings, Ms. McGuin informed the district court that Respondent had not mailed statements to her. Respondent then stated: "Ms. McGuin, you are a liar." Judge Goelz imposed a $100.00 sanction as a result of this action. It is not clear whether or not Respondent has paid this sanction. According to Judge Goelz, at the time of the district court proceeding, Ms. McGuin appeared frail.

99. Respondent was not able to produce the "many, many" statements referred to in his testimony before the district court. In fact, the only statement that has ever been produced appears to be Exhibit A-7, which was also used in the prior hearing.

100. During this disciplinary hearing, Respondent testified that his firm did not send statements to Ms. McGuin because she would not pay them and would "cry" when she received them.

101. Respondent's statements to Judge Goelz intentionally misled the tribunal regarding the agreement between the parties.

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[5] The tape of the District Court proceedings was played and transcribed as part of the present proceedings. See TR 93-122.

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102. Respondent's false statements were motivated by the desire to avoid his financial obligation to Ms. McGuin and to retaliate against her for her complaint to the Bar Association.

Count 3 Failure to Comply With Restitution Order

103. Respondent was obligated to pay restitution and interest to Ms. McGuin on or before September 19, 2002.

104. Respondent was fully informed of his obligation to make this payment and the date by which payment was to be made.

105. Respondent's own records document the fact that Ms. McGuin had paid him amounts in excess of the amount she was required to pay.

106. Respondent intentionally did not pay restitution until after he was ordered to do so by a district court judge when Ms. McGuin forced the issue by bringing suit.

107. Respondent resisted the obligation to pay Ms. McGuin in bad faith from September 19, 2002 until June 8, 2004.

108. As a result of his failure to pay the restitution and interest, Ms. McGuin filed a second Bar complaint against the Respondent.

109. On June 8, 2004, Bar Counsel informed Respondent and Ms. McGuin that the Bar Association was not going to act upon the complaint until after the litigation was completed.

110. By responding to the grievance in this matter, the Bar Association confused the issue of whether or not restitution had to be paid under the prior order. Respondent would not have been confused, however, had he complied with the restitution order in a timely fashion.

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111. Respondent asserts that the Bar Association could have obtained payment if it had reduced the matter to judgment. Respondent consistently exhibits a cavalier and hostile attitude regarding the Bar Association and his obligation to comply with disciplinary orders.

Count 4: False Statements to Disciplinary Board in First Proceeding.

112. The testimony and exhibits offered before the Hearing Officer in September 2000 and before the Disciplinary Board on April 13, 2001 were truthful. 113.

Respondent's testimony in the present proceeding relating to these same issues contradicts his testimony in the prior proceedings. Ms. McGuin did not owe Respondent money following the termination of their attorney/client relationship.

114. Respondent intentionally provided false testimony before the Hearing Officer in the present proceeding to avoid his obligations under the prior restitution order and to his former client. Respondent's testimony changed depending on what result he intended to achieve, without regard to the actual facts of the case.

D. Findings Regarding Harm

115. After learning that Ms. McGuin had brought her concerns to the attention of the Bar Association, Respondent sent the invoice, which falsely stated that Ms. McGuin owed him additional funds to a collection agency.

116. Respondent testified that his motivation for attempting to claim the additional fees was that he viewed Ms. McGuin's actions in going to the Bar Association as a breach of their contingent fee agreement. Respondent claimed that as a result of Ms. McGuin's actions, including her complaints to the Bar Association, he was entitled to an hourly fee.

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117. Respondent's actions were in retaliation for Ms. McGuin's exercise of her right to inquire as to whether or not an attorney has complied with his ethical obligations.

118. While Respondent did eventually recall the case from collections, the documents admitted at this hearing establish that this was done more than a year after the original referral to collections and solely because the Respondent did not believe further collection efforts would be successful.

119. Ms. McGuin, an elderly client with Parkinson's disease, is particularly vulnerable. To a lesser extent, Ms. McGuin was also vulnerable during 2004 when the district court proceeding occurred.

120. Ms. McGuin was seriously injured by Respondent's abusive litigation conduct in that she was denied access to restitution money that Respondent owed her.

120. Ms. McGuin was seriously injured by Respondent's conduct. She was repeatedly subjected to the stress of litigation with her former attorney for issues that should have been resolved conclusively following the Board's final orders in the prior disciplinary hearing. Respondent's manner in questioning and responding to Ms. McGuin was demeaning, rude and unprofessional.

121. Ms. McGuin was seriously injured by Respondent's manner of asserting his rights, including the allegations of dishonesty and theft made against her during these multiple proceedings.

122. The public and the legal system were seriously injured by Respondent repeatedly flaunting the disciplinary process and his refusal to fulfill his obligations under the ethical rules.

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123. Respondent's assertion of a frivolous defense in the district court injured the legal system by consuming resources that are better utilized for meritorious disputes. His claim of a right of offset involved Judge Goelz in research that would not have been necessary had Respondent been truthful regarding the nature of the prior proceedings, his prior testimony and the contingent fee agreement between he and Ms. McGuin.

E. General Findings Regarding Roxie Moreland Matter.

124. Respondent entered into an attorney client relationship with Roxie Moreland on August 16, 2004.

125. Respondent's normal course of business was to take notes during the initial client interview.

126. No notes were produced which document the initial interview between Roxie Moreland and Respondent.

127. Ms. Moreland brought a contractor, Gary Randall, who had pertinent information regarding Ms. Moreland's claim with her to this initial interview.

128. Mr. Randall corroborated Ms. Moreland's testimony that Respondent was hired to bring a bad faith claim against Farmer's Insurance and to take action regarding a lien that had been filed against Ms. Moreland's property.

129 Respondent's testimony contradicted that of Ms. Moreland and the independent witness, Mr. Randall, regarding the purpose of the representation and the ability to provide services in a timely fashion described below. Respondent testified that he was initially hired only to bring a claim against the contractor. Respondent's testimony was not credible.

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130. Respondent was aware of the need to act promptly. Ms. Moreland informed him of her need to have things done rapidly. Mr. Randall's testimony corroborated that of Ms. Moreland. He testified that he discussed the need for prompt remediation of the toxic mold problem in Ms. Moreland's house during the initial interview with Respondent. In addition, the statute of limitations for Ms. Moreland's claim against the insurance company was set to expire at the end of 2004.

131. During the course of the initial interview, Respondent volunteered that he would be available to handle the claim in a timely fashion. He indicated that he would have the lien taken care of in a week and would file the lawsuits within two weeks.

132. Respondent testified that he could not bring the lawsuit earlier because he needed documents relating to Ms. Moreland's damages. This testimony is not credible. Ms. Moreland provided Respondent with documents and information sufficient to commence the litigation against Farmers and against the contractor during the initial interview.

133. Despite his claim that he needed additional information in order to start the lawsuits, Respondent took no action to obtain further information regarding damages until several months after Ms. Moreland hired him. Unlike the subsequent attorney, Mr. Norman, Respondent did not visit the subject home or send an investigator or an expert there to document the damage.

134. Respondent prepared and had Ms. Moreland sign a retainer agreement that purportedly documents the agreement between the parties. Exhibit A-12. Paragraphs one, two, three, five, six and seven of the agreement describe an hourly fee agreement. Paragraph ten and eleven contain references to a two thousand dollar nonrefundable retainer and a contingent fee agreement. The retainer agreement is unclear as to the obligations of the parties. At least one of the Respondent's experts confirmed that the

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agreement was internally inconsistent and would have to be construed against the Respondent.

135. Ms. Moreland has difficulty reading. She testified that she simply signed where Respondent instructed her to sign and provided Respondent with the $2,000 he demanded before he would take the case. Ms. Moreland's testimony was credible. During the hearing her demeanor, her response to questions and her ability to follow the proceedings indicated that she had impaired abilities.

136. Paragraph six of the agreement provided that the client would receive monthly or other periodic billings from the Respondent. Respondent did not provide periodic statements to the client. The only invoice or accounting prepared for this client is that which Respondent sent on December 8, 2004 following Ms. Moreland's termination of the attorney/client relationship.

137. Respondent's telephone message records document that Ms. Moreland contacted Respondent on September 10, 14 and 27, 2004. The first two messages establish that Ms. Moreland expressed concern regarding whether Respondent had made efforts to remove the lien. These messages contradict Respondent's testimony that he was not hired to remove the lien.

138. The evidence established that Ms. Moreland informed Respondent no later than September 27, 2004[6] that she wanted her file returned and that she felt he was "misrepresenting her."

[6] Ms. Moreland testified that according to her notes, she requested the file back on September 13, 2004. As there are irregularities in Respondent's time records that suggest fabrication, it is possible that other records, including the telephone messages were also fabricated, that the one for September 13, 2004 was not provided or that Respondent's office simply did not record this message. The evidence on this issue does not meet the clear preponderance test, however. It is therefore assumed that the first clear decision to terminate Respondent occurred on September 27, 2004. Respondent's own records document that it occurred no later than that date.

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139. Respondent did not honor this request to terminate the attorney/client relationship. Instead, he assured Ms. Moreland that he would complete the promised services within a week.

140. Respondent did not perform work on Ms. Moreland's case in a timely fashion given the need for immediate action and his promises to the client. His time records document that he did not review the file until approximately one month had elapsed and Ms. Moreland had called to inquire about the status of her case. The first time entry documenting services by Respondent is dated four days after Ms. Moreland's September 10, 2004 telephone message.

141. Between the date he was retained and the date Ms. Moreland first requested her file be returned, Respondent did not contact any parties to ascertain their positions, take any steps to begin the lawsuit or investigate how to lift the lien on Ms. Moreland's house.

142. Respondent did not work on Ms. Moreland's file again until October 25, 2004. Respondent's time records document he researched the issues regarding the house lien on this date, more than two months after Ms. Moreland hired him. These records contradict Respondent's testimony that he did not act on the lien matter because he was waiting, as a litigation tactic, to see if the lien was perfected within the eight-month window.

143. Respondent's testimony that he waited to act on the lien dispute as a litigation tactic is not credible. The timing of his research on the issue suggests he did not analyze the issues until much later. In addition, the lien was filed by an attorney on behalf of the contractor, a fact Respondent knew, or should have known from the documents. The presence of an attorney representing the contractor makes it substantially unlikely that the lien would not be perfected in a timely fashion.

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144. Ms. Moreland contacted Respondent in late November setting a deadline for completion of the work. Respondent did not complete the work within the deadline.

145. The statute of limitations for filing and service of the complaint against the insurer was set to run less than thirty days from the date Ms. Moreland set for Respondent to act.

146. Ms. Moreland's decision to terminate Respondent's services on December 6, 2004 and request a refund of $1,600 was reasonable. The statute of limitations was about to expire and Respondent had consistently failed to fulfill his promises regarding when services would be provided.

147. Respondent refused to refund fees. Instead, Respondent produced an accounting, which allegedly documented provision of services valued in excess of the $2,000 Ms. Moreland had provided to Respondent.

148. The accounting, Exhibit A-16, is based on incomplete data, conflicts with documented phone messages between the parties and appears to have been fabricated for the purposes of justifying retention of the retainer.

149. Respondent's file, as received by Mr. Norman, contained no research, no correspondence with parties, and no work product. While Respondent asserts he did work on this file, there is no evidence other than his testimony that he did anything other than make one call to Mr. Randall in late October and make some rough notes regarding the case. Respondent's testimony regarding the services he allegedly provided to Ms. Moreland is not credible.

150. Respondent provided no services of value to Ms. Moreland.

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Findings Pertaining to Count 5

151. Respondent was retained to provide immediate assistance regarding the lien filed on Ms. Moreland's house and to file two actions.

152. Respondent did not review the file immediately and did so only upon receiving complaints from Ms. Moreland.

153. Respondent did not research the lien placed on Ms. Moreland's house in a timely fashion. He took no actions to remove the lien. His testimony that his failure to act on the lien was a tactical decision is not credible. Expert testimony elicited on this topic did not include full disclosure of the facts relevant to the issue and was thus of little value in resolving the issue.

154. Respondent did not investigate the dispute between Ms. Moreland and her insurer in a timely fashion. He did not draft and file a complaint in a timely fashion given Ms. Moreland's need to have the issues resolved quickly. While Respondent's conduct did not result in loss of the cause of action because of statute of limitations issues, this was because Ms. Moreland took preemptive action and changed attorneys before the deadline.

155. Respondent's failure to research applicable lien statutes and/or take action regarding the lien, constitutes a failure to diligently complete the agreed upon services.

156. Under the facts of this case where Ms. Moreland specifically requested and required immediate legal assistance, Respondent's delay in reviewing Ms. Moreland's file, delay in researching the lien issues and delay in drafting the complaint constitutes a failure to provide diligent representation.

Findings Regarding Count 6

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157. Respondent's fee agreement with Ms. Moreland is ambiguous, contains contradictory terms and is unclear as to the client's responsibilities and the terms of the agreement.

158. Respondent is aware of his obligation to explain clearly the terms of fee agreements to clients, as this issue has been the subject of prior discipline.

159. The fee agreement with Ms. Moreland does not comply with the Respondent's obligation to inform his client fully of her obligations.

Findings Regarding Count 7

160. Respondent's fee agreement, including the provision for the non-refundable retainer is void. The agreement does not comply with the requirements for fee agreements, as its terms are internally inconsistent.

161. Respondent breached his obligations under the agreement by not providing the services requested in a timely manner.

162. Respondent had an obligation to withdraw from the case and return the retainer when Ms. Moreland first demanded her file. Instead of returning the file, Respondent falsely informed Ms. Moreland that he was working on her case. According to Respondent's own records, he had not done needed research or performed any work of substance on the file.

163. The irregularity of the billing documents, combined with Respondent's failure to provide representation in a timely fashion, precludes a finding that Respondent earned the retainer. Respondent is entitled to only those fees associated with the initial one-hour consultation or $100.00.

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F. Harm Relating to Moreland Matter

164. Roxie Moreland is disabled and has limited comprehension of the complexity of her legal situation.

165. Respondent knowingly engaged in this conduct and was motivated by desire for financial gain.

166. Respondent's conduct regarding Ms. Moreland caused her serious injury by preventing her access to needed funds and delaying resolution of her case.

167 Ms. Moreland was seriously injured by the delay associated with starting work on her case after being assured that such work would commence immediately. The delay extended the length of time Ms. Moreland was required to live in unhealthy conditions caused by the toxic mold.

168. Ms. Moreland was seriously injured by having to seek alternative representation in order to commence her legal action in a timely fashion. Ms. Moreland's injury was mitigated by the prompt, effective action of Mr. Norman who ultimately resolved the matter in a manner beneficial to Ms. Moreland.

169. The public and legal system were damaged by Respondent's failure to correct his callous disregard of his obligation to communicate clearly with his clients as to fee arrangements, to follow through with his promises to perform work in a timely fashion, and his failure to correct conduct for which he had previously been disciplined.

G. Pattern of Misconduct

The Bar Association argued that the Respondent engaged in a pattern of misconduct that justifies disbarment. Respondent argued that the pattern of misconduct allegation was not pled in the Formal Complaint and should not be considered. Under ABA Standard

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9.22(c) pattern of misconduct is an appropriate factor to be considered as an aggravating factor.

170. Respondent's prior disciplinary record includes multiple incidents of failing to communicate fee agreements with clients and the charging of excess fees.

171. Respondent' dispute with Ms. Moreland appears to be essentially the same conduct for which he was suspended in 1989.

172. Respondent's conduct regarding Ms. McGuin and Ms. Moreland is consistent with the Respondent's prior pattern of failing to comply with an attorney's obligation to explain fully his charges for services and to retain only those fees that are reasonable.

173. Evidence exists that Respondent has a pattern of conduct prejudicial to the administration of justice.

174. In representing Ms. McGuin, Respondent was sanctioned at least twice.

175. In litigating his frivolous defense in district court, Respondent drew a sanction for calling Ms. McGuin a liar during the proceeding.

176. The Bar Association submitted a 1999 case, which resulted in dismissal of a client's case as a sanction for Respondent's actions in court. Exhibits A-48; A-49.

177. Respondent's prior disciplinary records indicate that he has drawn sanctions before courts in other instances. The number of sanctions imposed by different judicial officers on Respondent clearly exceeds that which could be anticipated during the course of the legal career of an attorney whose courtroom conduct was consistent with his ethical and legal obligations.

178. In the present hearing, Respondent engaged in conduct disruptive of the legal process, including proclaiming that certain testimony was "bullshit," advancing frivolous arguments and presenting false testimony and exhibits.

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179. Respondent's conduct in handling client matters, failing to comply with court orders, disrupting court proceedings, failing to comply with a disciplinary order which required restitution to be paid in a timely fashion, presenting a frivolous defense and testifying falsely constitutes a pattern of misconduct which evidences disrespect for the legal system, indifference to his role as an officer of the court, and a failure to comprehend the impact of his actions on vulnerable clients.

180. Respondent has multiple incidents of prior discipline, including a 1989 45-day suspension arising out of conduct regarding fee disputes substantially similar to those that he experienced with Ms. Moreland in 2004.

181. Respondent's total disciplinary record includes one 45-day suspension, one reprimand, three admonitions and two-year probation. These disciplinary actions were the result of misconduct with 14 different clients.

182. Respondent's pattern of conduct has seriously injured his clients and the legal system. Respondent is directly responsible for dismissal of two cases because of his misconduct.[7]

183. Respondent's age is not a contributing factor to his conduct. Respondent's conduct at the disciplinary hearing was consistent with the description of his conduct dating back more than twenty years.

184. At this disciplinary hearing, Respondent's manner and demeanor indicated that he was fully competent, aware of the pertinent legal and factual issues and skilled at presenting and responding to arguments. He did not exhibit memory problems except at times when the claim of poor memory worked to his advantage.

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[7] Only one of these cases resulted in a bar complaint. However, the Bar Association submitted documentation establishing that Respondent's conduct in the case of *Visser v. Costal Community Church* resulted in dismissal of the client's case. Ex. A-49. The dismissal was affirmed by Division Two in an unpublished decision. Ex. A-50.

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V. CONCLUSIONS OF LAW

Based on the forgoing Findings of Fact, the Hearing Officer makes the following Conclusions of Law:

Count 1. By asserting the right to an offset for fees based on Exhibit A-7 and by claiming that Ms. McGuin owed him money during the course Ms. McGuin's litigation against him, Respondent violated RPC 3.1.

Count 2. Respondent violated RPC 3.3(a) and RPC 8.4(c) by testifying falsely regarding his fee agreement with Ms. McGuin and submitting Exhibit A-7 to the district court.

Count 3. Respondent refused to pay restitution as ordered by the Disciplinary Board's order and thereby violated RPC 3.4 and RPC 8.4(1).

Count 4. Respondent did not provide false testimony during the September 11, 2000 disciplinary hearing or the oral argument before the Disciplinary Board. A clear preponderance of the evidence supports the proposition that Respondent's testimony that he had a contingent fee agreement with Ms. McGuin was true. This charge is dismissed.

Respondent's testimony before this tribunal, however, was false. The falsity of Respondent's testimony during this proceeding is an aggravating factor discussed below.

Count 5. Respondent failed to provide diligent representation in handling Ms. Moreland's claims. The circumstances of her case required immediate action and Respondent had agreed to those terms. His conduct violated RPC 1.3.

Count 6. Respondent failed to explain, adequately and accurately, his fee agreement and his ability to timely complete the requested services. Respondent's fee agreement is void as it violates RPC 1.4(b) and RPC 1.5(b) and because Respondent breached RPC 1.3 as established in Court 5.

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Count 7. Respondent failed to withdraw from representation of Ms. Moreland in a timely fashion to allow an attorney who had the ability to commit time to the case and handle the matter. He failed to return unearned fees in violation of RPC 1.5(a) and RPC 1.15(d).

VI. PRESUMPTIVE SANCTIONS

Determination of the appropriate sanction involves a two-step process applying ABA Standards For Imposing Lawyer Sanctions. *In re Anschell*, 149 Wn. 2d 484, 69 P.3rd 844 (2003). The first step is to determine the presumptive sanction considering the ethical duty violated, the lawyer's mental state, and the extent of the harm caused by the misconduct. ABA Std. 3; *In re Whitt*, 149 Wn. 2d 707, 717, 72 P.3rd 173 (2003). The second step in the process is to consider whether aggravating or mitigating factors should alter the presumptive sanction. *In re Johnson*, 118 Wn. 2d 693, 701, 826 P.2d 186 (1992).

A. Presumptive Sanctions Regarding McGuin Charges

Applying the presumptive sanction under the ABA Standards for imposing Lawyer Sanctions, the following sanctions are applicable to each count.

1. Count 1.

ABA Standards Section Seven apply to the Respondent's advancement of a meritless defense in the small claims action. The applicable standards are:

> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to the client, the public or the legal system.

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7.2 Suspension is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as professional and causes injury or potential injury to a client, the public, or the legal system.

Mental State:

Respondent presented the offset argument to the small claims court intending to obtain the benefit of not having to pay Ms. McGuin restitution to which the Disciplinary Board had previously ruled she was entitled.

Injury:

Respondent's conduct seriously injured Ms. McGuin and seriously injured the legal system. Ms. McGuin was and is a vulnerable, fragile elderly woman who had to resort to litigation in order to obtain her money. Forcing her to defend against a frivolous claim exacerbated her frustration with the legal system and delayed final resolution of the matter more than four years after the matter should have concluded.

Respondent's conduct injured the legal system by diverting scarce resources to a frivolous claim. The district court judge would not have had to conduct research had he known that Respondent did not have a factual basis for his claim for an offset.

Presumptive Sanction:

Disbarment is the presumptive sanction for Respondent's violation of RPC 3.1 by advancement of a meritless claim.

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2. Count 2: False Statements to District Court Judge Goelz.

Respondent violated RPC 3.3's duty to be truthful and RPC 8.4 by engaging in conduct involving dishonesty. Respondent's conduct was prejudicial to the administration of justice in that it was an attempt to thwart a legitimate order of restitution. Absent mitigating or aggravating factors, the presumptive sanction appropriate for cases involving conduct that involves dishonesty, fraud, deceit or misrepresentation and/or intentional or knowing misstatements to a court are as follows:

> 6.11 Disbarment is generally appropriate when a lawyer, with intent to deceive the court makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
>
> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Mental State:

Respondent's false statements and presentation of Exhibit A-7 to Judge Goelz were done with the intent to deceive the court. Respondent previously testified that Ms. McGuin did not owe him money and that the bill should not have been sent during the prior disciplinary hearing. His testimony before Judge Goelz to the contrary four years later is incompatible with those statements and is not the result of memory problems. Respondent had an obligation to inform Judge Goelz that his fee arrangement with Ms. McGuin was a contingent fee, and that he had previously so testified under oath.

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Respondent intentionally offered Exhibit A-7 as justification for a claimed offset although his prior testimony, under oath, established that Exhibit A-7 had been sent to Ms. McGuin in error and that she did not owe him anything. His testimony before Judge Goelz was intended to avoid his obligation to pay restitution and interest, and to avoid his obligations to Ms. McGuin.

Injury:

Respondent's conduct seriously injured Ms. McGuin by forcing her to defend against his frivolous, false claims. It caused significant harm to the legal system. An attorney who presents false testimony and tampers with the legal system engages in conduct that strikes at the heart of the rule of law. To do so for a client is serious misconduct. An attorney who engages in dishonest conduct in order to advance the lawyer's own ends takes that harm one-step further because the intended beneficiary of the misconduct is the lawyer, not the client. Under such circumstances, there can be no claim that the attorney was simply being zealous in defense of the rights of another. Here, Respondent was dishonest in protecting his own interests. The ABA Standards reserved the highest sanctions, usually disbarment, for misconduct intended to benefit the lawyer.

Presumptive Sanction:

Disbarment is the presumptive sanction for Respondent's dishonest conduct in violation of RPC 3.3 and 8.4(c).

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3. Count 3: Failure to Pay Restitution.

Failure to pay the restitution as ordered by the Disciplinary Board implicates two sections of the ABA Standards, Sections Seven and Eight. Those standards applicable to this count are:

> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to the client, the public or the legal system.
>
> 7.2 Suspension is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as professional and causes injury or potential injury to a client, the public, or the legal system.

The second applicable section is Section Eight.

> 8.1 Disbarment is generally appropriate when a lawyer:
>
> (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system or the profession, or
> (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system or profession.
>
> 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct that cause injury or potential injury to a client, the pubic, the legal system, or the profession.

Mental State:

Analysis of count three differs from the other McGuin charges because the Bar Association's letter informing the parties that it would not act until after litigation was completed may have affected Respondent's mental state regarding his obligations under

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the prior disciplinary order. Respondent's obligation to pay restitution attached on September 19, 2001. Between that date and the date of the Bar's letter of June 8, 2004, Respondent intentionally and willfully violated the Disciplinary Board's order that he pay restitution to Ms. McGuin.

The Bar's letter confused the issue as it did not refer the Respondent to its prior order or direct him to pay the restitution. Instead, the letter stated that the Bar was going to remain neutral in the matter until litigation was complete. After this letter, the mental state of intent is not present by a clear preponderance of the evidence. Respondent's conduct was at least negligent however, because a reasonable lawyer would have followed up on the Bar letter to clarify his obligations. Respondent did not do so, and therefore his mental state for the period after June 8, 2004 was negligent. However, because Respondent intentionally disregarded the restitution order for nearly three years, the change in his mental state after June 8, 2004 does not affect either the presumptive sanction or the recommended sanction.

Injury:

Respondent's intentional failure to pay the restitution denied Ms. McGuin, an elderly woman on a fixed income, the use of the money from the date the order became final until Respondent paid the judgment of the district court. This conduct also forced Ms. McGuin to bring litigation to obtain payment.

Respondent's conduct caused serious injury to Ms. McGuin by denying her money to which she was entitled and by forcing her to litigate a matter that had previously been resolved in her favor. Although Respondent paid the restitution principal as a result of

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Judge Goelz's order, he has yet to come forward with interest on the principal as the original disciplinary order required.

This conduct caused serious injury to the public trust in the legal system as a system of amicably resolving disputes. Respondent intentionally ignored a directive of the Disciplinary Board and seriously undercut the public's trust that the Bar can effectively govern its members.

Presumptive Sanction:

Disbarment is the appropriate sanction for Respondent's intentional violation of his obligation to pay restitution to Ms. McGuin.

B. Aggravating and Mitigating Factors Relevant to McGuin Charges.

1. Aggravating factors

a. ABA Std. 9.22 (a) Prior Discipline Record

Respondent has substantial prior discipline, including a forty-five day suspension. This discipline record documents multiple instances where Respondent's conduct caused serious injury to the interests of his clients.

b. ABA Std. 9.22 (b) Dishonest or Selfish Motive

Respondent's conduct includes the implicit intent to retaliate against Ms. McGuin for bringing his conduct to the attention of the Bar Association. Respondent testified repeatedly that he engaged in certain conduct, including changing his fee agreement, because he felt that Ms. McGuin had violated the terms of their agreement by seeking

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repayment of the money she paid him in sanctions. Essentially, this testimony is an admission that Respondent acted because Ms. McGuin turned him into the Bar Association. While Respondent denies intent to retaliate, his testimony is not credible. The evidence establishes that had Ms. McGuin not contacted the Bar Association, Respondent would have considered her to have paid her obligations to him in full. Because she took action, he testified that she was in breach of their agreement and that he was justified in trying to collect more money from her.

His anger with Ms. McGuin prompted him to send her an invoice alleging that she owed him in excess of $11,000 and to send that invoice to a collection agency. The retaliation against a client because she has exercised her right to bring misconduct to the attention of the Bar Association is reprehensible.

c. ABA Std. 9.22 (c) Pattern of Misconduct

Respondent has engaged in a pattern of misconduct that includes multiple instances of fee disputes with clients, misrepresentations during the course of litigation and other misconduct affecting the administration of justice.

d. ABA Std. 9.22 (d), Multiple offenses

Respondent has been found to have committed misconduct establishing multiple violations of the Rules of Professional Conduct and caused serious harm to two disabled clients

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e. ABA Stds 9.22 (e); (f)
Bad Faith Obstruction of Disciplinary Proceeding/Submission of False Evidence

Respondent has interfered with the disciplinary process by submitting false evidence during this disciplinary proceeding and engaging in conduct disruptive to the proceedings.. This aggravating factor is not based on the conduct that was the subject of the charges, but rather on Respondent's submission of false testimony during the present disciplinary hearing.

Respondent's attitude toward the disciplinary process appears to be of long duration. In the disciplinary hearing, which culminated in his suspension from the practice of law, the hearing officer specifically commented on Respondent's "cavalier attitude". The Supreme Court was also concerned by this issue and cited to the hearing officer's comments.

> In concluding, the hearing officer was particularly troubled by what he described as Burtch's
>
> > rather cavalier attitude toward the Bar Association when all these things were brought to his attention. That in my opinion is the most damning evidence you have here on the problem whether or not the circumstances that brought on all these difficulties are now behind him and he will not be plagued again with a series of complaints from his clients.

In Re Burtch, 112 Wn.2d 19, 25, 770 P. 2d 174 (1989).

f. **ABA Std. 9.22 (g) Refusal to Acknowledge Wrongful Nature of Conduct**

Respondent specifically testified that he believed he treated both clients "fairly." His standard of conduct for representing clients appears to be so low as to consider

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nothing wrong with the notion that a lawyer is entitled to alter fee agreements based on whether or not a client has brought a matter to the attention of the Bar.

g. ABA Std. 9.22(h) Vulnerability of Victim

As noted in the discussion of procedural issues relevant to the hearing, Ms. McGuin was so fragile of a victim that her testimony had to be halted during cross-examination because of its obvious impact on her emotional and physical well-being. While Ms. McGuin is in fact younger than Respondent, her physical condition is much weaker as a result of her Parkinson's disease. Judge Goelz confirmed that Ms. McGuin appeared frail during the 2004 hearing, which is the subject of this proceeding.

(h) ABA Std. 9.22(i) Substantial Experience in the Practice of Law

Respondent has been practicing law since 1955. He has diverse litigation experience and still actively litigates cases. Alert and confident, his age and experience inspire confidence in potential clients.

(i) ABA Std. 9.22(j) Indifference to Making Restitution

As this topic is the subject of one of the sustained charges, it cannot also be considered an aggravating factor. *In re Whitt*, 149 Wn. 2d 707, 720, 72 P.3d 173 (2003).

2. Mitigating Factors:

There are no mitigating factors specific to Ms. McGuin's case, which justify departure from the presumptive sanction.

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Respondent asserts his age, his reputation and the confusion created by the Bar Association's letter are mitigating factors. Age, in and of itself, is not a mitigating factor recognized by the ABA Standards. Respondent's age reflects his substantial experience. If Respondent's age were combined with evidence of frailty or competency issues, this factor might mitigate his behavior. ABA Std. §9.32(h). At this hearing, Respondent exhibited no characteristics compatible with a finding of frailty based on age.

The evidence relating to Respondent's reputation was insufficient to constitute a mitigation of his conduct.

Most troublesome is the allegation that there was confusion created by the prior decision. The confusion that existed, however, either benefited the Respondent or occurred after the misconduct.

It is true that the Findings of Fact did not resolve the question of whether a contingent fee agreement existed and when that agreement existed. On the other hand, those were not issues in the prior case. The Respondent provided clear, unequivocal testimony that there was a contingent fee agreement in place as of October 1993 and that Ms. McGuin did not owe him any money because of that agreement. The only issue was whether or not Ms. McGuin could be forced to pay the sanctions. As a result of those issues not being at issue, a detailed accounting, though desirable, did not seem to be necessary. That fact worked to Respondent's advantage as had a detailed accounting been done, it would have been discovered that he owed Ms. McGuin even more money than what was ordered.

Confusion was created when the Bar Association notified Respondent that it would take no action until the conclusion of the civil proceeding. As noted above, however,

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had Respondent promptly complied with the obligation to make restitution, there would have been no confusion. The restitution would have been paid and there would have been no complaint. The Bar's conduct therefore does not mitigate Respondent's failure to pay restitution.

C. Recommended Discipline Counts One, Two and Three:

Respondent has failed to identify mitigating factors that would justify departure from the presumptive sanction. Moreover, multiple aggravating factors justifying disbarment exist. Most troubling of these is the Respondent's false testimony during this proceeding concerning the nature of his agreement with Ms. McGuin. The presentation of false testimony by a lawyer strikes at the core values of our legal system and substantially undermines the disciplinary process. Our courts have wisely concluded:

> Falsifying information during an attorney discipline proceeding is one of the most egregious charges that can be leveled against an attorney. Ms Whitt harmed her client by casting doubt on his claims, harmed the public by jeopardizing the reputation and perception of the legal system as a whole and harmed the legal system by attempting to circumvent the disciplinary process to evade responsibility for her misconduct. As such, disbarment is justified for count III. Even if the misconduct was considered as an aggravating factor to counts I and II, it would still justify increasing the sanction from suspension to disbarment.

In re Whitt, 149 Wn. 2d at 720. (Internal citations omitted)

It is hereby recommended that the appropriate sanctions for counts one, two and three be disbarment.

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D. Presumptive Sanctions Regarding Roxie Moreland Matter:

1. Count Five: Lack of Diligence

The issues regarding diligence in Ms. Moreland's case differ from a typical diligence case because of her unique situation. Ms. Moreland was a vulnerable client who had a special need for prompt action, which Respondent stated he would provide. Failure to provide prompt services under these circumstances justifies the finding of lack of diligence.

ABA 4.42 provides:

> Suspension is generally appropriate when:
>
> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
>
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Mental State:

Respondent knowingly failed to act diligently in providing services for Roxie Moreland. Gary Randall, an independent witness, confirmed that Respondent had been informed of the need to act quickly and that Respondent had volunteered to Ms. Moreland that he had the time to act on her behalf in a timely fashion. Despite his knowledge, and repeated pleas by the client, Respondent failed to provide the promised services in a timely fashion.

Injury:

The delay in Ms. Moreland's case prolonged the time she lived in a home contaminated by toxic mold. Ms. Moreland, like Ms. McGuin, has serious disabilities and

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is vulnerable. Failure to act in a timely fashion caused Ms. Moreland serous injury by delaying the completion date of remedial measures on her home. It imposed additional stress on her by forcing her first to aggressively seek completion of the tasks from Respondent and then locate an alternative attorney.

Presumptive Sanction:

Suspension is the presumed sanction for this allegation of misconduct.

2. Count Six and Count Seven Failing to Explain Adequately Fee Agreement, Charging Unreasonable Fees, Failure to Return Unearned Fees

ABA Standard §7 governs violations of other duties as a professional.[8] Under RPC 1.5(b), Respondent had an obligation to explain, clearly and precisely, the terms of his fee agreement with Ms. Moreland and to charge reasonable fees. The following sections of the ABA Standards apply to this misconduct:

> §7.1 Disbarment is generally appropriate when a lawyer knowing engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system.
>
> §7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

[8] Counsel for the Bar Association groups counts five and six together and analyzes both under Section Four, Violation of Duties to Clients. Counsel then analyzes count seven under Section Seven of the ABA Standards. This officer disagrees that the proper presumptive sanction is found in section four. The duty to explain fully fee agreements, although a duty to the client, also implicates fee issues, which have been analyzed under ABA Standards Section Seven. *In re Brothers*, 149 Wn. 2d 575, 585, 70 P.3rd 940 (2003). While the choice of section may impact the presumptive sanction, because the charges in count six were a repeat of conduct for which the Respondent was previously sanctioned, the choice of section does not impact the ultimate recommendation.

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Mental State:

Respondent knowingly engaged in the conduct contained in counts six and seven to obtain a financial benefit. Respondent cannot claim that he is unfamiliar with the obligation to explain fee agreements adequately to his clients as he was suspended in 1989 for failing to perform this duty as to other clients and for failing to return unearned fees. See *In Re Jack L. Burtch,* 112 Wn. 2d 19, 770 P. 2d 174 (1989). Respondent is an experienced lawyer who should have been familiar with the acceptable form of contingent fee agreements and aware that his agreement did not comply with the minimum required under RPC 1.5. Respondent knowingly lied to Ms. Moreland about doing work on her case in September in order to avoid being terminated and to retain the $2,000.

Respondent knowingly had his office create an invoice, which purported to document time spent valued in excess of the $2,000 non-refundable retainer.

Injury:

Respondent's conduct caused serious injury to a disabled client. Ms. Moreland lives on a limited income. Because of Respondent's conduct she was forced to live in her home under conditions that were detrimental to her health for a longer period than would have been necessary had he acted promptly. Respondent's decision to keep the $2,000 retainer made it difficult for Ms. Moreland to obtain legal services elsewhere.

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Disbarment is the presumptive sanction for counts six and counts seven under this section because Respondent knowingly engaged in the conduct to obtain a financial benefit and because his conduct caused serious injury to the client.

Mr. Burtch's prior discipline also brings §8.1 of the ABA Standards into play. That section states:

> §8.1 Disbarment is generally appropriate when a lawyer:
>
> (b) has been suspended for the same or similar misconduct and engages in similar acts of misconduct that causes injury or potential injury to a client, the public, the legal system or the profession.

Comparison of the facts in *In re Burtch, supra*, and the present case reveals that there is no difference in the type of misconduct Mr. Burtch engaged in at that time and that which he exhibited in dealing with Ms. Moreland. Mr. Burtch agreed to provide services, which he did not perform and attempted to retain fees to which he was not entitled.

Presumptive Sanction Counts Six & Seven

Respondent has been suspended for the exact conduct he engaged in with Ms. Moreland. Application of section seven and section eight results in a presumptive sanction of disbarment for counts six and seven.

E. Aggravating Factors:

a. ABA Std. 9.22 (a) Prior Discipline Record

See above.

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b. ABA Std. 9.22 (b) Dishonest or Selfish Motive

Respondent's motive was to maximize his income at the expense of the client.

c. ABA Std. 9.22 (c) Pattern of Misconduct

Respondent's conduct regarding fee disputes is well documented in his prior disciplinary actions and described fully in *In re Burtch, supra.* The fee dispute with Ms. Moreland is substantially similar to those described therein.

d. ABA Std. 9.22 (d), Multiple offenses

Respondent's conduct regarding Ms. Moreland involves three distinct breaches of the ethical rules and is aggravated by additional sustained counts regarding Ms. McGuin.

e. ABA Stds 9.22 (e) Bad Faith Obstruction of Disciplinary Proceeding

This aggravating factor does not apply except as it relates to the submission of false evidence discussed below.

(f) Submission of False Evidence

Respondent has submitted time records that appear to have been created for the purpose of justifying his fees regarding Ms. Moreland. In addition, his testimony regarding the scope of work he undertook for Ms. Moreland and the timing when he performed the work was false.

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(g) ABA Std. 9.22 (g) Refusal to Acknowledge Wrongful Nature of Conduct

Respondent specifically testified that he believed he treated both clients "fairly." Respondent sees nothing wrong with his fee agreements and does not acknowledge his misconduct.

(h) ABA Std. 9.22(h) Vulnerability of Victim

Ms. Moreland, like Ms. McGuin, was a vulnerable client. She is disabled and lives on a limited income. Her living situation substantially aggravated her vulnerability as she needed the issue resolved for her own health. Respondent's conduct interfered with her ability to resolve those issues in a timely fashion.

(i) ABA Std. 9.22(i) Substantial Experience in the Practice of Law

See prior discussion.

(j) ABA Std. 9.22(j) Indifference to Making Restitution

Respondent continues to maintain that he was entitled to the full $2,000 and has made no attempt to make restitution or correct his conduct.

G. Mitigating Factors

No mitigating factors apply specifically to Ms. Moreland's case. Although Respondent asserts delay in the proceedings as a factor, the misconduct occurred less

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than two years ago and a formal complaint was filed within the year. No delay in proceedings has occurred.

H. Recommendation Counts Five, Six and Seven

Respondent's conduct reflects a pattern of misconduct that was the subject of a forty-five day suspension earlier in his career. Despite his knowledge of his ethical obligations regarding fee agreements, diligence and communication regarding fee agreements, Respondent continues to have disputes with his clients of the same type as those for which he was suspended. Two factors deserve specific consideration. First, Respondent's latest victims are both disabled individuals with limited incomes. Second, Respondent's testimony regarding his encounters with both clients exhibits a callous disregard for truth and his obligation of candor as a lawyer. Respondent simply testifies without regard to the facts or the evidence and creates evidence to substantiate his position. The legal system and the public's confidence in it are seriously damaged by such behavior.

V. GENERAL DISCUSSION OF MITIGATING FACTORS

Unlike the defense raised to the misconduct, which resulted in his suspension, in this proceeding Mr. Burtch has been unable to identify outside stressors that explain why he engaged in misconduct. He cites to his long career as a lawyer and his age, the lack of dishonest or selfish motive, full and fair disclosure to the Bar Association, his character or reputation, delay in proceedings, and the remoteness in

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time of the events as mitigating factors which justify a more lenient disposition of his case.

There is insufficient evidence to establish mitigating factors.

There is insufficient evidence regarding Respondent's medical condition and how it related to these events. Respondent merely offered testimony that he had a heart condition sometime during the time he represented Ms. McGuin, but provided no specific dates of incapacity.

The more fundamental problem with Respondent's argument is that even if the Respondent had a physical disability, no medical condition justifies dishonest conduct.[9] This officer concludes that Respondent's prior medical condition is not a mitigating factor for the misconduct here in dispute.

Nor is age a mitigating factor in this case. Mr. Burtch's misconduct spans the last twenty years and predates his current advanced age. Moreover, either Mr. Burtch is competent to practice law, and his age reflects added experience that aggravates his misconduct, rather than mitigates it, or he is not. If he believes that his age affects his ability to represent clients competently, he should surrender his license to practice. If he is competent, he must face the full consequences of his dishonest acts.

Respondent also raised the age issue during the prior disciplinary proceedings with Ms. McGuin. He told the Bar that he was trying to sell his practice and argued

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[9] A medical condition that affected the lawyer's ability to act intentionally might justify mitigation. No evidence was presented to establish such a link between the heart and gall bladder conditions discussed during the hearing and the Respondent's ability to act intentionally.

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that the recommended suspension would be fatal to his practice. Ex. 42, p. 6. The Board concluded that suspension was not appropriate under those facts.

As a result of the leniency shown at that time, Ms. McGuin has suffered further injury and Ms. Moreland has become yet another victim of the Respondent's unethical conduct. The failure to correct Respondent's behavior seriously undermined the credibility of the disciplinary system.

Respondent has not learned from his previous mistakes or taken advantage of the leniency previous given. Rather than reforming his conduct so that his last years as a lawyer could end honorably, Respondent flaunted the disciplinary process by refusing to pay restitution. He has defended his conduct with frivolous arguments and has been dishonest. This conduct models behavior to the public and other members of the Bar incompatible with the practice of law. Although disbarment of an attorney after 51 years of practice is indeed a harsh remedy, without such action the public has no protection.

This Officer also rejects the argument that the events were either remote in time or unnecessarily delayed. Had Respondent paid the restitution order in 2001 as required, this matter would have concluded at that time. Moreover, the most offensive misconduct occurred in 2004 when Respondent offered false testimony and a frivolous defense before the district court. Ms. Moreland's complaint also arises from Respondent's conduct in the latter half of 2004. Neither of these timeframes are remote.

Nor is Respondent's prior discipline "remote." The record establishes that Respondent's conduct followed a consistent pattern abusive to the legal system.

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From the early eighties through 2006, Respondent has been either committing ethical violations or defending against sanctions imposed as a result of them.

Respondent contends that he did not have a dishonest or selfish motive He argues that the "allegedly falsity (sic) of statement depends upon the context and the time in which Mr. Burtch presented his legal basis for requesting an offset." **Respondent's Closing Brief at 20.** This argument is disingenuous. The only thing that changed between Respondent's testimony in the 2000 hearing and his testimony before Judge Goelz is that he was ordered him to pay restitution.[10] No attempt to confuse the timing of events changes that specific fact or negates the clear inference that the motivation for Respondent's conduct was his own selfish desires for revenge and to avoid the financial obligation imposed by the disciplinary order.

The allegation that Respondent cooperated with the Bar Association is of little weight. Under these facts, it is outweighed by the Respondent's failure to obey the disciplinary order directing him to make restitution or to testify truthfully in this proceeding.

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[10] Another example of the Respondent changing his testimony to avoid the consequences of his acts is his testimony before the disciplinary board. Before the Hearing Officer Respondent unequivocally testified that the change to a contingent fee occurred in 1993. As noted above, that testimony is supported by circumstantial evidence.

When the Hearing Officer ruled that he owed Ms. McGuin restitution, Respondent told the Disciplinary Board that the date the contingent fee agreement took effect was immediately before the 1996 trial. Ex. 42, p. 8. This statement would support a finding that Respondent lied during the 2001 Disciplinary Review hearing.

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VII. PROPORTIONALITY

Respondent asserts that if he were disbarred, his punishment would be disproportionate to that received by other lawyers.[11] He argues that his misconduct involved "an interpretation of a legal issue, not a material misrepresentation of fact to a tribunal." **Respondent's Brief at 19**. As indicated above, a clear preponderance of the evidence supports the charge of providing false factual testimony under oath to the district court judge as well as providing false factual testimony before this tribunal. Respondent's testimony concerned the fact that he did or did not have a contingent fee and what date that the switch from hourly to contingent occurred. These are not issues of legal interpretation.

Respondent' case differs from those where the court has ordered suspension for the presentation of false evidence or statements. Respondent's case differs as to the type of injuries sustained by the victims and the mental states present when the offenses occurred. Here, Respondent's actions caused serious injury to two disabled clients and to the legal system. Unlike *In Re Dynan,* 152 Wn.2d 601, 619, 98 P.3rd 656 (2004) or *In re Poole*, 156 Wn.2d 196, 222, 125 P.3rd 954 (2006), the injuries here are not "potential injuries" but actual serious injuries.

Respondent's mental state also differs from the above cases. Here, Respondent acted with intent regarding the McGuin matter. Intentional falsification is the most egregious and merits the highest sanctions. *In re Whitt, supra.*

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[11] Proportionality is probably an argument best made before the reviewing bodies. Since Respondent has raised it, however, a short discussion of the merits of the argument is in required.

Respondent has also raised various legal arguments including the allegation that the Bar's conduct impairs his constitutional right to contract. These arguments are frivolous and will not addressed herein.

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VIII. OVERALL RECOMMENDATIONS

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system and the legal profession. ABA Standards, §1.1. Respondent Jack L. Burtch is a lawyer who has not and will not properly discharge his duties. The Hearing Officer recommends that the Respondent be disbarred.

It is also recommended that Respondent be suspended pending final resolution of this matter. Respondent should be required to pay the interest awarded on the prior restitution order relating to Ms. McGuin and the outstanding excess fees plus interest.

Respondent should also be ordered to pay restitution in the amount of $1900, plus interest, to Roxie Moreland.

Dated this 14th day of September 2006.

Bertha B. Fitzer, WSBA #12184
Hearing Officer

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE

JACK L BURTCH,

LAWYER (BAR NO. 4161)

Plaintiff/Petitioner

vs.

Defendant/Respondent

Cause #:

Declaration of Service of:
ASSOCIATION'S PETITION FOR INTERIM SUSPENSION

Hearing Date:

Declaration:

The undersigned hereby declares: That s(he) is now and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the date and time of **Mar 21 2007 1:45PM**

at the address of **218 N BROADWAY ST ABERDEEN**

within the County of **GRAYS HARBOR** State of **WASHINGTON**

the declarant duly served the above described documents upon

JACK L BURTCH

by then and there personally delivering **1** true and correct copy(ies) thereof, by then presenting to and leaving the same with

JACK L BURTCH ATTORNEY GENERAL

No information was provided that indicates that the subjects served are members of the U.S. military.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: March 23, 2007 at Olympia, WA

by L. Randall
L. Randall

The documents listed above were served in accordance with RCW 4.28.080 and/or client instructions. If service was substituted on another person or left with a person that refused to identify themselves, it is incumbent upon the client to notify ABC Legal Services, Inc. immediately in writing if further attempts to serve, serve by mail, or investigate are required. If service was substituted on another person, pursuant to RCW 4.28.080 (16), service shall be complete on the tenth day after a copy of the documents are mailed to the subject at the address where service was made. Documents were not mailed by ABC Legal Services, Inc.

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